



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: SEPTEMBER 29, 2022

IN THE MATTER OF:

Appeal Board No. 624846 A

PRESENT: JUNE F. O'NEILL, MEMBER

In Appeal Board Nos. 624846, 624847 and 624848, the claimant applied to the Appeal Board pursuant to Labor Law § 534 for a reopening and reconsideration

of, and the Appeal Board on its motion pursuant to Labor Law § 534 has

reopened and reconsidered, the decisions of the Appeal Board, filed June 16, 2022, which modified the decisions of the Administrative Law Judge and sustained the initial determination holding the claimant ineligible to receive benefits, effective September 21, 2020 through February 28, 2021, on the basis that the claimant was not totally unemployed, as modified to be effective three days in the weeks ending September 27 and October 11, 2020; October 12, 2020 through November 22, 2020; two days in the week ending January 24, 2021; and one day in each of the weeks ending January 31, February 7, February 14, February 21 and February 28, 2021; sustained the initial determination charging the claimant with an overpayment of \$40.25 in benefits recoverable pursuant to Labor Law § 597 (4), \$2,133.25 in Pandemic Emergency Unemployment

Compensation (PEUC) benefits repayable pursuant to § 2107 (e) (2) of the

Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, and \$600.00 in Federal Pandemic Unemployment Compensation (FPUC) benefits repayable pursuant to § 2104 (f) (2) of the Coronavirus Aid,

Relief, and Economic Security (CARES) Act of 2020, as modified to charge the claimant with an overpayment of \$40.25 in benefits recoverable pursuant to Labor Law § 597 (4), and PEUC benefits in an amount to be recalculated by the

Department of Labor, with no recoverable overpayment of FPUC benefits; and sustained the initial determination reducing the claimant's right to receive future benefits by 136 effective days and charging a civil penalty of \$416.02 on the basis that the claimant made willful misrepresentations to obtain benefits, as modified to be effective with respect to the weeks ending September 27, October 11, October 18, October 25, November 1, November 8, November 15 and November 22, 2020, and January 24, January 31, February 7, February 14, February 21 and February 28, 2021, only.

In Appeal Board No. 624849, the claimant applied to the Appeal Board pursuant to Labor Law § 534 for a reopening and reconsideration of, and the Appeal

Board on its motion pursuant to Labor Law § 534 has reopened and reconsidered,

the decision of the Appeal Board, filed June 16, 2022, which modified the decision of the Administrative Law Judge and sustained the initial determination holding the claimant ineligible to receive benefits, effective April 18, 2021 through June 20, 2021, on the basis that the claimant was not totally unemployed, as modified to be effective one day each week in the weeks ending April 25, May 2 and May 16, 2021, only.

In Appeal Board Nos. 625303 and 625304, the Appeal Board, on its motion pursuant to Labor Law

§ 534, has reopened and reconsidered the decisions of the Appeal Board, filed

June 16, 2022, which modified the decisions of the Administrative Law Judge and overruled the initial determinations charging the claimant with an overpayment of \$321.75 in benefits recoverable pursuant to Labor Law § 597

(4); and reducing the claimant's right to receive future benefits by 48 effective days and charging a civil penalty of \$100.00 on the basis that the claimant made willful misrepresentations to obtain benefits.

Upon consideration of the entire record, the Board makes the following

FINDINGS OF FACT: The claimant worked for the employer from June 2013 through June 20, 2021. He worked part time as a wellness trainer. He reported his hours of work each day by punching his code into the employer's time clock.

The code is personal to the employee. He was paid by the hour based on his time punches. During 2020, he was paid at a rate of \$11.98 per hour, which increased to \$12.50 per hour as of December 27, 2020.

The employer was closed for a while at the beginning of the COVID-19 pandemic, and the claimant was not working during that time. He filed a claim for benefits on March 26, 2020.

The claimant returned to work on September 21, 2020, at which point he worked four-hour shifts three days per week for a total of 12 hours per week. Including September 21, 2020, a day on which he did one hour of paid training, he worked three days per week in the weeks ending September 27, 2020 and October 11, 2020. He worked four or more days in the weeks ending October 18, October 25, November 1, November 8, November 15, and November 22, 2020. The claimant had worked at least one day during each of the weeks ending January 3, January 10 and January 17, 2021, and certified that he did not work those weeks.

The claimant usually certified for benefits on Sunday morning online. When certifying prior to January 18, 2021, the claimant was asked how many days he had worked during the week. The claimant certified that he worked two days in the week ending September 27, 2020, and zero days in each of the weeks ending October 11, October 18, October 25, November 1, November 8, November 15, and November 22, 2020.

During the week ending January 24, 2021, he worked 17.00 hours over the course of four days. During the week ending January 31, 2021, the claimant worked 13.50 hours over the course of three day. During the week ending February 7, 2021, he worked 13.25 hours over the course of three days. During the week ending February 14, 2021, he worked 11.75 hours over the course of three days. During the week ending February 21, 2021, the claimant worked 11.25 hours over the course of three days. During the week ending February 28, 2021, he worked 15.25 hours over the course of four days.

The claimant filed a new claim on March 28, 2021. The claimant did not work from April 8 through April 18, 2021. He worked 12.00 hours over the course of three days in the week ending April 25, 2021. He worked 11.75 hours over the course of three days in the week ending May 2, 2021 and he also worked 11.75 hours over the course of three days in the week ending May 16, 2021. He worked 6.50 hours over the course of two days in the week ending June 20, 2021.

Starting with his certification for the week ending January 18, 2021, the claimant saw instructions online for certifying to his number of "days" worked based on the number of hours he worked that week. The instructions included a chart and stated that for the period of January 18, 2021 through August 16, 2021 zero to four hours of work should be reported as zero days, five to 10 hours should be reported as one day, 11-20 hours should be reported as two days, 21-30 hours should be reported as three days, and 31 or more hours should be reported as four days. A representative of the Department of Labor told the claimant to certify by following the chart. The claimant certified to working zero days in each of the weeks ending January 24, January 31, February 7, February 14, February 21, February 28 and June 20, 2021. He certified to working one day in each of the weeks ending April 25 and May 2, 2021, and two days in the week ending May 16, 2021.

The claimant received \$40.25 in benefits for the week ending September 27, 2020 at issue. He also received the \$600 of FPUC benefits for the weeks ending January 24, 2021 and February 28, 2021 and \$2,133.25 of PEUC benefits at issue.

During the period from the week ending April 11, 2021 through the week ending June 20, 2021, the claimant also received the \$321.75 of regular benefits at issue.

OPINION: The Appeal Board has reopened its decisions because we inadvertently applied the rules applicable to partial unemployment for the period beginning August 16, 2021 instead of the rules which are applicable to the period beginning January 18, 2021 through August 15, 2021.

The credible evidence establishes that during the period of September 21, 2020 through February 28, 2021, the claimant was not totally unemployed on three days during the weeks ending September 27, 2020 and October 11, 2020, including September 21, 2020. In addition, the claimant was not totally unemployed for four or more days during each of the weeks ending October 18 and 25, November 1, 8, 15 and 22, 2020. We are not persuaded that the claimant did not work four or more days during each of the weeks at issue in October and November, as the claimant conceded that the pay detail report produced by the employer was accurate for that period.

With respect to the period beginning January 18, 2021, new rules were in effect to determine total unemployment. 12 NYCRR § 470.2(h), "Day of Total

Unemployment," effective January 18, 2021, provides:

1. For the purpose of calculating the number of effective days in a week to determine a claimant's weekly benefit entitlement in accordance with Labor Law § 590, a claimant shall experience a "day of total unemployment" or "full day

of total unemployment" on each day that is not a day of employment.

2. The total number of "day(s) of employment" in a week shall be calculated by adding the total number of hours worked in a week of employment, provided however that no hours in excess of ten are included per calendar day, dividing the total number of hours by ten, and rounding up to the nearest whole number. If the total number of hours worked in a week is equal to or less than four hours, no day of employment will have occurred. For example, a claimant who works a total of 3 hours in a week shall be deemed to have engaged in zero days of employment, a claimant who works a total of 8 hours in a week shall be deemed to have engaged in one day of employment, and a claimant who works a total of 13 hours in a week shall be deemed to have engaged in two days of employment, except that if the 13 hours occurred on one calendar day, such claimant shall be deemed to have engaged in one day of employment.

Under the new rule, part-time workers like the claimant may be eligible to collect partial benefits even though their hours of work extended over the course of four or more days. Applying the rule applicable to the period beginning January 18, 2021, as the claimant worked between 11 to 20 hours during each of the weeks ending January 24, January 31, February 7, February 14, February 21, and February 28, 2021, the claimant is deemed to have worked two days during each of those weeks. Therefore, the claimant was eligible to receive two days of benefits, or 50 percent of his weekly benefit amount, for each of those weeks. As the claimant worked 6.5 hours during the week ending June 20, 2021, the claimant is deemed to have worked one day during that week and was eligible to receive three days of benefits, or 75 percent of his weekly benefit amount, for that week.

The credible evidence further establishes that the regular unemployment benefits that the claimant received for the week ending September 27, 2020, included \$40.25. The claimant worked three days that week, which included September 21, the day he did online training. However, as he certified that he worked only two days, a statement which is factually false, the regular

unemployment benefits of \$40.25 are recoverable. As the claimant worked four or more days during each of the weeks from the week ending October 18, 2020 through November 22, 2020 and worked two days during each of the weeks from the week ending January 24, 2021 through the week ending February 28, 2021, all weeks for which the claimant certified he had worked zero days, consistent with federal law, two days of PEUC benefits that were paid for each of those weeks is recoverable. Regarding the FPUC benefits, a claimant is entitled to FPUC benefits for any week in which he was eligible for at least \$1 of PEUC benefits. As the claimant was entitled to two days of PEUC benefits for each of the weeks ending January 24, 2021 through the week ending February 28, 2021, the FPUC benefits paid for each of those weeks are not recoverable. The amount of the recoverable overpayment of PEUC and FPUC benefits is referred to the Department of Labor for recalculation.

The credible evidence further establishes that for each of the 14 weeks at issue between the week ending September 27, 2020 through the week ending February 28, 2021, along with the three additional weeks ending January 3, January 10 and January 17, 2021, the claimant certified to working fewer days than he actually worked or was deemed to have worked, as in 16 of the weeks he certified to working zero days. As the claimant knew how many days he had worked, as well as how many hours he had worked for each of the weeks beginning January 18, 2021, each of the claimant's certifications amounts to a willful misrepresentation to obtain benefits. He is therefore subject to the forfeiture penalty imposed. In addition, since the claimant is subject to a recoverable overpayment, he is also subject to a civil penalty. The amount of the civil penalty is referred to the Department of Labor for recalculation in accordance with the decision.

The credible evidence establishes that the claimant lacked total unemployment for the weeks ending April 11, 2021 and April 18, 2021. In this regard, we accept the employer's testimony, as supported by the employer's records, that the claimant did not work and received COVID-19 sick pay for those weeks. However, regarding the remaining period, as the claimant worked 12 hours during the week ending April 25, 2021 and worked 11.75 hours during the weeks ending May 2 and May 16, 2021, applying the rules applicable beginning January 18, 2021, the claimant is deemed to have worked two days during each of those three weeks. As the claimant certified to working one day during each of these weeks, he was overpaid one day of benefits each week. With respect to the week ending June 20, 2021, as the claimant worked 6.5 hours, the claimant is deemed to have worked one day. The claimant, however, certified he worked zero days

and was, therefore, overpaid one day of benefits. As his certifications which did not properly follow the rules were therefore factually false, the overpaid regular unemployment insurance benefits are recoverable. The amount of the recoverable overpayment is referred to the Department of Labor for recalculation in accordance with this decision.

The credible evidence establishes that the claimant certified to not working during the weeks ending April 11, 2021 and April 18, 2021 and to working two days during the week ending May 16, 2021 when he is deemed to have worked two days that week. For those weeks, his accurate certifications do not amount to willful misrepresentations. However, the claimant certified to working fewer days than he is deemed to have worked during the weeks ending April 25, May 2 and June 16, 2021. As the claimant knew or should have

known how many hours he had worked during those weeks, his certifications to working fewer days than he is deemed to have worked pursuant to the applicable rules constitute willful misrepresentations to obtain benefits. He is, therefore, subject to a forfeiture penalty of 24 effective days. As he is also subject to a recoverable overpayment, a civil penalty is also imposed. The amount of the civil penalty is referred to the Department of Labor for recalculation in accordance with the decision.

DECISION: The decisions of the Appeal Board, filed June 16, 2022, are rescinded.

The decisions of the Administrative Law Judge are modified as follows and, as so modified, are affirmed.

In Appeal Board No. 624846, initial determination, holding the claimant ineligible to receive benefits, effective September 21, 2020 through February 28, 2021, on the basis that the claimant was not totally unemployed and/or had earnings that exceeded the statutory limitation, is modified to be effective two days during the weeks ending January 24, 2021, January 31, 2021, February 7, 2021, February 14, 2021, February 21, 2021 and February 28, 2021; three days during the weeks ending September 27, 2020 and October 11, 2020; four or more days during each of the weeks ending October 18, 2020, October 25, 2020, November 1, 2020, November 8, 2020, November 15, 2020 and November 22, 2020, and, as so modified, is sustained.

In Appeal Board No. 624847, initial determination, charging the claimant with

an overpayment of \$40.25 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4), Federal Pandemic Unemployment

Compensation (FPUC) benefits of \$600.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, and charging the claimant with an overpayment of Pandemic Emergency Unemployment Compensation of \$2,133.25 recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, is modified to charge a recoverable overpayment of \$40.25 in regular unemployment insurance benefits and FPUC and PEUC benefits in an amount to be recalculated by the Department of Labor in accordance with this decision, with no recoverable overpayment of FPUC benefits, and, as so modified, is sustained.

In Appeal Board No. 624848, initial determination, reducing the claimant's right to receive future benefits by 136 effective days and charging a civil penalty of \$416.02 on the basis that the claimant made willful misrepresentations to obtain benefits, is modified to impose a forfeit penalty of 136 effective days and a civil penalty to be recalculated by the Department of Labor in accordance with this decision, and, as so modified, is sustained.

In Appeal Board No. 624849, initial determination, holding the claimant ineligible to receive benefits, effective April 18, 2021 through June 20, 2021, on the basis that the claimant was not totally unemployed and/or had earnings that exceeded the statutory limitation, is modified to be effective two days for the weeks ending April 25, 2021, May 2, 2021, and May 16, 2021; and one day during the week ending June 20, 2021, and, as so modified, is sustained.

In Appeal Board No. 625303, initial determination, charging the claimant with an overpayment of \$321.75 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4), is modified to charge an

overpayment to be recalculated by the Department of Labor in accordance with this decision, and, as so modified, is sustained.

In Appeal Board No. 625304, initial determination, reducing the claimant's right to receive future benefits by 48 effective days and charging a civil penalty of \$100.00 on the basis that the claimant made willful misrepresentations to obtain benefits, is modified to impose a forfeit penalty of 24 effective days and a civil penalty to be recalculated by the Department

of Labor in accordance with this decision, and, as so modified, is sustained.

The amounts of the recoverable overpayment of FPUC and PEUC benefits in Appeal Board No.

624847, the civil penalty in Appeal Board No. 624848, the recoverable overpayment of regular unemployment insurance benefits in Appeal Board No. 625303, and the civil penalty in Appeal Board No. 625304, are referred to the Department of Labor for recalculation in accordance with this decision.

The claimant is denied benefits with respect to the issues decided herein.

JUNE F. O'NEILL, MEMBER